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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIONE P. LUI,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to accept review in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals issued a published decision in this case, State v. Sione P. Lui, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4160609 (November 23, 2009).

C. QUESTION PRESENTED FOR REVIEW

Whether testimony of supervising scientists that is based on testing conducted by others in their respective laboratories violates the Confrontation Clause, where the testifying experts reached their own conclusions and proffered their own opinions to the jury and were subject to cross-examination, and the underlying reports were not admitted into evidence?

D. STATEMENT OF THE CASE

A detailed statement of the facts is set forth in the State's response brief filed in the Court of Appeals. The State will not

repeat the substantive facts of the murder, nor detail the evidence in support of the defendant's guilt, in this brief.

A few facts about the expert testimony in this case nevertheless bear mentioning at this juncture. Dr. Harruff, the Chief Medical Examiner for King County, testified based on findings from the autopsy of the victim. RP 1333. While Dr. Harruff had not personally performed the autopsy, he had contemporaneously reviewed the work of the pathologist who did, and he had co-signed the autopsy report. RP 1337-38, 1340-41, 1343. The report itself was not admitted into evidence. RP 1368, 1372.

Gina Pineda, who testified based on the results of DNA testing, was the associate director and technical leader of the laboratory that did the analysis. RP 1483. She supervised daily operations at the lab, and was responsible for maintaining standard operating procedures and quality control. RP 1484. Pineda looked at the electronic data generated from the samples in this case, and made her own interpretations and drew her own conclusions. RP 1507. While the jury was able to view the raw data as Pineda explained her conclusions, the lab reports were not admitted into evidence. Ex. 136, 137.

E. ARGUMENT

1. THIS COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES.

The Court of Appeals held that the presentation of the testimony of Dr. Harruff and Gina Pineda did not violate Lui's rights under the Confrontation Clause of the Sixth Amendment because he had a "full opportunity to test the basis and reliability of the experts' opinions and conclusions" via cross-examination. Lui, 2009 WL 4160609 at *1, 9.

In reaching this conclusion, the court carefully and thoroughly analyzed the recent decision of the United States Supreme Court in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Lui, at *3-8. In Melendez-Diaz, the Supreme Court held that the State's presentation at trial of certificates of analysis, as its sole proof of the contents of plastic bags seized from the defendant, violated his Sixth Amendment right to confront the witnesses at his trial. Melendez-Diaz, 129 S. Ct. at 2530-31, 2532, 2542.

The Court of Appeals distinguished the facts of Lui's case from those in Melendez-Diaz in several important respects. First

and foremost, unlike in Melendez-Diaz, where the State presented its expert testimony in the form of an affidavit only, Lui was able to confront Dr. Harruff and Gina Pineda. Lui, at *6. Each of these witnesses testified to his or her own opinions and conclusions based upon the testing done. Id. Moreover, the reports themselves were not admitted into evidence. Id.

The Court of Appeals summed up its reasoning:

Here, Dr. Harruff and Pineda testified as expert witnesses against Lui. Though their opinions were based partially on forensic work performed by others, the record shows that their opinions and conclusions were independently derived from their significant expertise and analysis that they applied to the forensic work of others. They did not base their opinions solely on testimonial hearsay and merely recount what others who performed forensic work said. And to the extent they disclosed information provided by others to the jury, that information was offered to explain the basis for their opinions as provided for under the Rules of Evidence.

Id. at *9.

The State believes that the Court of Appeals correctly resolved this case, and that this Court should affirm. Nevertheless, the case presents a significant question of law under the Constitution of the United States, and thus qualifies for review by this Court. RAP 13.4(b)(3). The State agrees with the petitioner that trial judges and criminal practitioners need the Sixth

Amendment question presented in this case answered by the highest court of this state, and ultimately by the United States Supreme Court.


F. CONCLUSION

For all the foregoing reasons, this petition for review should be granted.

DATED this 20th day of January, 2010.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B.

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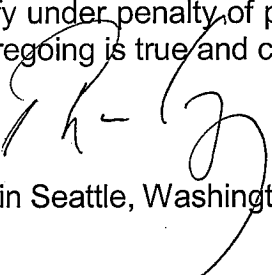
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ANSWER TO PETITION FOR REVIEW in **STATE V. SIONE P. LUI**, Cause

No. **84045-8**, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name



Date

1-20-10

Done in Seattle, Washington